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FEC MAIL CENTER

June 12, 2012

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BY HAND DELIVERY

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6563

Dear Mr. Herman:

This office represents Every Republican is Crucial ("ERICPAC") and its Treasurer, Melinda Fowler Allen. We respectfully respond to a May 3, 2012, letter from Mr. Jeff S. Jordan transmitting a complaint ("Complaint") designated Matter Under Review ("MUR") 6563 by the Federal Election Commission ("FEC" or "Commission"). Mr. Jordan's letter states that the "complaint indicates the Every Republican Is Crucial (ERICPAC) and [Melinda Fowler Allen], as treasurer, may have violated the Federal Election Campaign Act of 1971."

However, the Complaint does not identify ERICPAC as a respondent and does not contain any allegation of a statutory or regulatory violation by ERICPAC. Nor does Mr. Jordan's letter explain what in the complaint "indicates" that a violation by our clients has occurred. Pursuant to the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), FEC regulations, and established, written Commission policy, this defective notice mandates that ERICPAC be dismissed as a respondent to this MUR. In any event, the Complaint does not allege any facts that constitute a violation by ERICPAC as a matter of law.

THE COMPLAINT

The Complaint alleges that Representative Aaron Schock, a member of the U.S. House of Representatives, impermissibly solicited a \$25,000 contribution to the Campaign For Primary Accountability ("CPA"), an independent expenditure-only political committee ("IEOPC") registered with FEC. The complainants allege that they "have reason to believe that Rep. Schock's alleged solicitation of a \$25,000 contribution to Campaign for Primary Accountability violated 2 U.S.C. §§ 441i(e)(1)(A) and 441(a)(1)(C) as interpreted by the Commission in Advisory Opinion 2011-12 (Majority PAC)." Complainants say these provisions limited any solicitation by Representative Schock to an amount that did not exceed \$5,000. The

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Complaint relies on press accounts to support its understanding of the facts and to allege a violation by Representative Schock.

In contrast to these allegations, the Complaint contains no factual or legal allegations of misconduct by ERICPAC. Rather, the Complaint refers to ERICPAC only once. Quoting a *Roll Call* newspaper article, the Complaint contends that following Representative Schock's solicitation of a \$25,000 contribution, "ERICPAC subsequently made a contribution." The Complaint does not allege that ERICPAC's donation violated the Act.

DISCUSSION

A. ERICPAC Is Deprived of Notice of an Alleged Violation

The Act requires that "[w]ithin 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation." 2 U.S.C. § 437g(a)(1) (emphasis added). Commission regulations similarly mandate that a complaint "clearly identify as a respondent each person or entity who is alleged to have committed a violation," and "contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(1), (3). An FEC guidebook specifies that a complaint must "[c]learly recite the facts that describe a violation of a statute or regulation" and also must "[c]learly identify each person, committee or group that is alleged to have committed a violation." FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, at 6 (May 2012), available at http://www.fec.gov/em/respondent_guide.pdf.

Furthermore, FEC regulations require that the Commission provide a respondent "an opportunity to demonstrate that no action should be taken on the basis of a complaint." 11 C.F.R. § 111.6(a). The Commission is not permitted to take action against a respondent without considering a respondent's response to a complaint. *Id.* § 111.6(b).¹

¹ The significance of providing a respondent with notice of the facts underlying any allegation of wrongdoing is also evident in the FEC's procedures for non-complaint generated matters. While this MUR involving ERICPAC was complaint-generated, enforcement matters may be based on information ascertained in the normal course of the FEC's supervisory functions. *See* 2 U.S.C. § 437g(a)(2). The FEC has published a notice specifically detailing the procedures for providing a respondent notice of the facts and allegations of any wrongdoing in non-complaint

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The Act, Commission regulations, and the FEC guidebook all require that ERICPAC be dismissed as a respondent to this MUR because the Complaint (1) does not identify ERICPAC as a respondent, (2) does not allege any facts constituting a statutory or regulatory violation by ERICPAC, and, accordingly, (3) does not provide ERICPAC an opportunity to respond to any allegation of a statutory or regulatory violation.

Representative Aaron Schock – not ERICPAC – is the respondent named in the Complaint. The Complaint's title lists "Rep. Aaron Schock" as the party against whom the Complaint was made. The very first sentence of the Complaint states "Rep. Aaron Schock, a member of the U.S. House of Representatives, solicited a \$25,000 contribution . . . in violation of provisions of" FECA and FEC regulations. The Prayer for Relief in the Complaint states, in part, that "the Commission should find reason to believe that Rep. Aaron Schock has violated" provisions of FECA.

Given that ERICPAC is not the respondent, the Complaint, not surprisingly, does not contain any accusation of wrongdoing by ERICPAC. In fact, the entire five-page Complaint contains a single, fleeting reference – in the second paragraph – to ERICPAC. Since one of the Complaint's signatories, Donald J. Simon, is a self-proclaimed "expert on campaign finance law issues," *see* Democracy21 Bios, http://www.democracy21.org/index.asp?Type=B_BASIC&SEC={A5452EE4-024B-4A2F-BF7B-4F4C2BCBFFD2} (last visited June 5, 2012), and the other is himself an experienced practitioner, *see* J. Gerald Hebert, Attorney at Law, Biography, <http://www.voterlaw.com/bio.htm> (last visited June 5, 2012), they surely would detail in their Complaint any violation committed by ERICPAC, if any existed. They did not.

The requirement that a respondent be given an opportunity to demonstrate that no action should be taken contemplates a fair opportunity to respond to a clearly described alleged violation. Here, neither the FEC's notice nor the Complaint provide any such description or explanation. In such circumstance, a respondent is effectively denied the opportunity to respond as required by the Act and Commission regulations.

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generated matters so that the respondent is afforded a meaningful opportunity to respond. Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38617-18 (Aug. 4, 2009).

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Because the Complaint does not identify ERICPAC as a respondent and fails to identify any facts suggesting a violation by ERICPAC, ERICPAC must be dismissed as a respondent to this MUR. Furthermore, the Commission cannot proceed against ERICPAC because the deficiencies of the Complaint deprive ERICPAC of its right to meaningfully respond.

B. ERICPAC Made a Lawful Donation to CPA

In the absence of any specific allegation (which, as noted above, is required by the Act, FEC regulations, and Commission policies), we can only confirm the following information. ERICPAC is registered with the Commission as a leadership PAC associated with Congressman Eric Cantor (FEC committee identification number C00384701). ERICPAC made a \$25,000 contribution to the CPA, and this contribution was properly reported on ERICPAC's April 2012 report. There is no legal dollar limit on the amount that may be donated to CPA, an IEOPC. See Advisory Opinion 2010-11 (July 22, 2010).

The Complaint suggests that Representative Schock violated 2 U.S.C. § 441i(e)(1). Pursuant to 2 U.S.C. § 441i(e)(1), "an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of" a candidate for or an individual holding federal office may not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of [the] Act." (emphasis added).

A "leadership PAC," such as ERICPAC, is directly or indirectly established, financed, maintained or controlled by a federal officeholder or candidate for federal office.² Furthermore, a leadership PAC is subject to the limitations, prohibitions, and reporting requirements of FECA with respect to the contributions the leadership PAC receives. See 2 U.S.C. § 441a; Advisory Opinion 2011-21 (Dec. 1, 2011) (explaining that a leadership PAC "may not receive unlimited funds from

² A "leadership PAC" is defined as "a political committee that is directly or indirectly established, financed, maintained or controlled by a candidate for Federal office or an individual holding Federal office but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that leadership PAC does not include a political committee of a political party." 11 C.F.R. § 100.5(e)(6). See also 2 U.S.C. § 434(i)(8)(B).

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individuals or any funds from corporations or labor organizations because such funds would not be subject to the limitations and prohibitions of the Act”).

Because all funds of ERICPAC comply with the limitations, prohibitions and reporting requirements of the Act, ERICPAC may make the contribution referenced in the Complaint. The FEC drew the same conclusion when addressing the ability of a candidate's campaign committee to make an unlimited donation to a campaign for non-federal office in Illinois. In Advisory Opinion 2007-29 (Dec. 10, 2007) (the “Jesse Jackson opinion”), the FEC considered whether Representative Jesse L. Jackson, Jr.'s principal campaign committee was permitted, as a matter of federal campaign finance law, to donate funds to his wife's campaign for Committeeman of the 7th Ward in the Cook County Democratic Party. The FEC concluded that since the funds in Representative Jackson's principal campaign committee comply with the amount and source restrictions of the Act, the amount of money that may be donated to Ms. Jackson's 7th Ward Committeeman campaign fund was “not restricted by 2 U.S.C. 441i(e)(1).” *Id.* Thus, ERICPAC, which is also bound by the Act's contribution limits and prohibitions on the contributions it receives, is not restricted by 2 U.S.C. § 441i(e)(1) in making the contribution noted in the Complaint.

Advisory Opinion 2011-12 (June 30, 2011) (“Majority PAC opinion”), which is invoked by the Complaint is inapposite with respect to ERICPAC. The Majority PAC opinion was not addressing the situation here, nor the situation in the Jesse Jackson opinion, where a political committee established, financed, maintained or controlled by a federal candidate or officeholder, e.g., a leadership PAC or campaign committee, contributes to an IEOPC or in connection with a non-federal election. In fact, the Majority PAC opinion does not mention the Jesse Jackson opinion. Nonetheless, the Majority PAC opinion recited the exception to 2 U.S.C. § 441i(e)(1) for the expenditure of funds that are “subject to the limitations, prohibitions, and reporting requirements’ of the Act.” Like the funds at issue in the Jesse Jackson opinion, ERICPAC's funds qualified for this exception. Therefore, ERICPAC was not subject to 2 U.S.C § 441i(e)(1) when it donated \$25,000 to CPA.

CONCLUSION

If the Complaint “indicates” that ERICPAC violated the Act or Commission regulations, we respectfully request a detailed description of the specific facts and

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legal basis for any such allegation. Otherwise, ERICPAC and its treasurer should be dismissed as respondents to this MUR.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jan Witold Baran", written over a horizontal line.

Jan Witold Baran

Caleb P. Burns

Cc: Chairwoman Caroline C. Hunter
Vice-Chairwoman Ellen L. Weintraub
Commissioner Cynthia L. Bauerly
Commissioner Donald F. McGahn II
Commissioner Matthew S. Petersen
Commissioner Steven T. Walther

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